Submission to the Education, Tourism, Innovation and Small Business Committee

Regarding the Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016

Young People In Nursing Homes National Alliance

July 2016

The **Young People In Nursing Homes National Alliance** thanks the Committee for its invitation to provide a submission to the Inquiry into the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill* 2016. The Alliance appreciates this opportunity to provide a further contribution to the development of the full National Injury Insurance Scheme (NIIS) in Queensland.

The Alliance made submissions to the Committee's inquiry into the NIISQ and takes a keen interest in the development of the NIIS in Queensland and around Australia. We believe that the NIIS is a critical and underrated reform and commend the Queensland Government and this Committee for taking these issues seriously.

While this submission is brief and only addresses a couple of key issues with the Bill, the Alliance is keen to speak directly with the Committee in a public hearing to expand on these and other points further.

The Young People In Nursing Homes National Alliance (YPINH Alliance)

The YPINH Alliance is a national peak organisation that promotes the rights of young disabled Australians with high and complex health and other support needs living in residential aged care facilities or at risk of placement there (YPINH); and supports these young people to have choice about where they live and how they are supported.

The Alliance's membership is drawn from all stakeholder groups including YPINH, family members and friends, service providers, disability, health and aged care representatives, members of various national and state peak bodies, government representatives and advocacy groups.

We encourage a partnership approach to resolution of the YPINH issue by State and Commonwealth governments; develop policy initiatives at state and federal levels that promote the dignity, well being and independence of YPINH and their active participation in their communities; and ensure that young people living in nursing homes and their families have

- A voice about where they want to live and how they want to be supported;
- The capacity to participate in efforts to achieve this; and
- 'A place of the table', so they can be actively involved in the service responses needed to have "lives worth living" in the community.

As the pre-eminent national voice on this issue, the National Alliance's primary objectives are to

- Raise awareness of the plight of YPINH;
- Address the systemic reforms required to resolve the YPINH issue and address the urgent need for community based accommodation and support options for young people with high and complex needs;

- Work with government and non-government agencies to develop sustainable funding and organisational alternatives that deliver 'lives worth living' to young people with high and complex clinical and other support needs;
- Provide on-going support to YPINH, their friends and family members.

Since its inception in 2002, the Alliance has argued for a lifetime care approach to development of supports and services for disabled Australians; and for collaborative arrangements between programs and portfolio areas including health, disability, aged care and housing to provide the integrated service pathways required by YPINH and others with lifelong health and disability support needs.

Alignment with the NIISQ

The Alliance supports the design of the scheme being closely aligned with the operation of the NIISQ. A number of areas exist, however, where a distinct lack of alignment and service gaps exist that must be addressed if the NIIS is to be a coherent scheme.

We broadly support the provisions for the planning and funding of treatment and support for injured people that are the same as those in place for the NIISQ. We also think that the option for the NIIQ to be able to manage catastrophic injury claims for workers compensation insurers is a good one. The latter's capacity to manage these claims effectively in the past has been historically low because of the small numbers of catastrophic injury claims brought forward.

We expect that the NIISQ will develop skills, systems and networks in lifetime support to enable them to be much more effective in delivering this function than isolated claims officers. Doing so also establishes the NIISQ as the platform for the NIIS development in Queensland. A number of specific issues that require amendment for consistency are referred to below.

Inclusions for scheme eligibility

The Bill contains a number of specific exclusions that we believe need to be reversed. The definitions and exclusions in the draft Minimum Benchmarks for Catastrophic Injury look to have been carried over from existing provisions in workers compensation legislation from the jurisdictions without due regard to the particular public health and budgetary contexts of a no-fault NIIS.

One is the exclusion of injuries related to serious and wilful misconduct by a worker. (s 232H (2)(b). This is not aligned with the NIISQ Act that does not place restrictions on types of conduct or status of drivers or passengers on Queensland roads. As a result, this exclusion is already out of step with the NIISQ's provisions for motor vehicle accidents and creates an artificial division between the causes of accidents, a division that should not exist in a no-fault scheme.

It also gives rise to the indefensible position where some people's 'serious and wilful behaviour' (such as drink driving, "hooning" or criminal activity) is covered for

lifetime care and support, but others are not. The circumstances of injury causes that are excluded in this Bill, could be far less socially unacceptable that those that are covered in the NIISQ scheme.

Section 34(1)(c) excludes workers injured while on temporary absence during an ordinary recess. This is also an unreasonable exclusion in the modern workplace. An example provided to the Alliance recently was that of nurses working in a Brisbane hospital who are no longer allowed to smoke on Queensland Health property and leave the worksite during breaks to smoke. In doing so, these nurses place themselves outside insurance cover because they leave the premises. Such actions are also common for workers who go to an offsite café during a break.

In a similar vein, many workplaces now have flexible work arrangements that make it difficult to define an official recess period.

For these several reasons, we believe this exclusion is an archaic and unreasonable one for a no fault scheme.

The Alliance is also aware of people who have sustained catastrophic injuries in that space between CTP and workers compensation schemes that are neither journey accidents nor workplace accidents. One such person acquired a brain injury in Victoria from a collision with a skateboarder outside her place of work. She had left work and was walking to the tram stop when she was hit. She was no longer at work and the tram was not involved in the accident so she was non-compensable.

Other exclusions arise by virtue of the use of the definition of a worker in s34 and 35, further detailed in the draft NIIS Minimum Benchmarks for Workplace Injury.[1] The list of exclusions is substantial and means that people routinely undertaking activity in workplaces, such as volunteers, people on work experience and work trials, work for the dole programs and others who have a different corporate status but still 'go to work' (including company directors or people in a partnership), are not covered for lifetime care and support.

For these reasons, we believe that eligibility for the NIIS in this Bill must be as broad as possible so that people injured in workplace contexts are brought into scope. Not doing so would otherwise see these individuals left without access to necessary rehabilitation or lifetime support.

These exclusions may have made sense historically in the absence of substantial disability reform effort. However, they make no sense at all in the NIIS context, particularly as the Queensland government has committed to underwrite the cost of catastrophic injury outside any injury insurance arrangement.

[1] Commonwealth Treasury. *National Injury Insurance Scheme–Workplace Accidents Consultation Regulation Impact Statement (RIS)*, Canberra, March 2015: 23. See http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2015/NIIS%20Workplace%20Accidents/Key%20Documents/PDF/NIIS-RIS-03-2015.ashx

Until the general injury category is finalised in the NIIS implementation, there is a risk that people injured in these marginal workplace contexts could be left in this predicament and be forced into institutional settings because no other options exist.

Pending the full implementation of the NIIS, we would like to see consideration given to the widest practicable inclusions in this reform.

A no-fault system should be just that…fault should not be appended to any injury circumstance under such a system. The decision to exclude certain types of workers may meet the draft minimum benchmarks for Workplace Accidents[2] and align with the definition of an eligible worker in the current Act, but it falls short of what is required in the reform.

Having exclusions such as those in the draft minimum benchmarks and in this Bill thus undermines the very purpose of no-fault schemes as key public health initiatives, and simply shifts costs to other government programs and to injured people and their families.

In her tabling speech the Minister reminded the house that the Heads of Agreement with the Commonwealth

> …*committed Queensland to either implement a lifetime care and support scheme for workplace accidents that meets the national minimum benchmarks or be 100 per cent responsible for the costs of people who sustain catastrophic injuries from 1 July 2016.*

Maintaining these exclusions aligns more closely with the system that we are leaving behind rather than the one we are committed to moving towards and is misguided. Leaving this stage of the NIIS to go forward with these exclusions is neither good design nor prudent; and as indicated previously, merely shifts the costs of care for excluded people to the Queensland budget.

As well as a lack of net saving to the State of Queensland as indicated by the Minister above, there is also a distinct lack of continuity and control over how injured people are managed if they are left to the NDIS as a safety net.

The NDIS was never intended to be a substitute for a catastrophic injury scheme. Because it does not fund rehabilitation, the NDIS cannot fully address the needs of people needing rehabilitation and recovery from injury.

This rehabilitation gap was identified by the Commonwealth Treasury in its Consultation Regulation Impact Statement (RIS).

[2] Ibid.

> *Another issue with relying on the NDIS is that it does not cover medical and rehabilitation costs immediately resulting from the accident, but rather covers the support costs of living with the catastrophic injury (disability). However, the true cost of an accident includes these medical and rehabilitation costs, therefore individuals will either have to pay these costs themselves, rely on jurisdiction based health systems or not access these early support services to the detriment of their long term outcomes*[3]

They identified that the cost of this gap will ultimately fall back to governments.

> *The cost of the NDIS providing coverage is equal to the Productivity Commission's estimate of the estimated cost of the NIIS (noting that immediate medical and rehabilitation costs are included in the NIIS and not the NDIS. However, these costs will most likely be funded through jurisdictional health systems and therefore still be a cost to governments)*[4]

One of the rationales for the introduction of the NDIS and NIIS was to reduce the inequity and uncertainty for people with catastrophic injuries and disability. As the Productivity Commission said in its *Disability Care and Support Inquiry Report*;

> *The practical consequence for people acquiring disability is that the amount, nature and timeliness of support depends on the type of accident, its exact circumstances and location. This can have very lasting impacts for people with catastrophic injury.*[5]

This raises a central question for this Inquiry – why go through this reform and create the NDIS and NIIS, if people from the very target group that the reform is there to benefit are to be excluded? With no financial gain, citizen benefit or public policy imperative, leaving these exclusions in place is simply poor public policy.

If there are additional costs to the scheme from dropping these exclusions in this Bill, they would be offset in the long term by not having to repay care costs to the NDIS. They would be further offset but delivering reduced care costs across an injured individual's lifetime that would be generated by timely, quality rehabilitation. As such, we recommend that the Queensland Government remove the current exclusions for the NIIS for workplace injuries and underwrite any additional costs to ensure these are not unfairly borne by employers.

Given the outstanding stated commitment of the Queensland Government to the NIIS, we would like to see Queensland lead other jurisdictions in the design of the NIIS for workplace accidents. This leadership would include going beyond the

[3] PwC. *National Injury Insurance Scheme; Motor Vehicle Accidents Consultation Regulation Impact Statement*, Canberra, April 2014: 18.
[4] Op Cit: 29.
[5] Productivity Commission, *Disability Care and Support Inquiry Report,* Canberra, Vol. 2, 2011: 798.

minimum benchmarks and providing capacity for all people sustaining catastrophic injuries in work situations to be included in the NIIS.

We think it is essential that, in these early stages of the NIIS reform, deliberate gaps in cover are not contemplated. If they are, they will result in the progressive erosion of the no-fault system's integrity and deliver a minimalist NIIS only.

We recognise that reform in this area is contested and not easy for governments. However, the Queensland Government's initiative in embracing this crucial reform locates adoption of these old exclusions – if they are maintained – as lazy policy making at best.

Reviews and Appeals

The Bill provides for a pathway of reviews of decisions but relies on the existing appeals mechanism in the workers compensation scheme.

> *Disputes will be resolved using the existing dispute resolution mechanisms in the Act including the medical assessment tribunals to resolve medical disputes, internal review by insurers, review rights to the Workers' Compensation Regulator and appeal rights to the Queensland Industrial Relations Commission where NIIS-related disputes do not involve purely medical matters.*[6]

It would seem that if the Bill provides for the NIISQ to manage catastrophic injury claims under contract to workers compensation insurers because of their skills, capacities and scale; then the appeals mechanism available to participants of NIISQ should also be available to participants contracted to NIISQ under this Act.

If the Government believes that catastrophic injury management requires specialist skills and management, then it should follow that this expertise should extend to the tribunal that hears appeals. QCAT will, over time, develop a good working knowledge of NIISQ and the issues facing participants.

The same workforce of claims managers, assessors, coordinators of support and providers are involved in working with participants from both schemes. For this reason, external appeals on all decisions should be heard in a tribunal that also deals with catastrophic injury matters.

The Queensland Industrial Relations Commission, like the workers compensation insurers in Queensland, will be unlikely to ever develop any scale or particular expertise in these matters as they are out of scope. The consistency across the two schemes in this area is important to establish from the outset.

[6] Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016. Explanatory Notes: 2.

We recommend that the dispute resolution mechanisms in the Act (ss506B, 538 & 540)) be amended to reflect that NIIS claims need the same dispute resolution provisions as the NIISQ; and enable appeals from NIIS participants to be heard in the same QCAT list as NIISQ participants.

Access to no fault benefits

The Alliance has expressed a strong preference for a comprehensive no fault scheme for people sustaining catastrophic injury that does not include option for common law for lifetime care and support benefits. Our submissions and evidence provided to the NIISQ inquiries detailed the reasons for this position.

With the implementation of the NIISQ as a hybrid scheme it is important that there is the same flexibility for people injured in workplace accidents to enter or re enter the scheme to access no fault benefits.

One of the positive design features of the NIISQ is the provision for injured people to apply to enter the scheme under a range of circumstances to enable them to access the lifetime no-fault benefits. This includes people injured prior to the existence of the NIIS who have exhausted their settlement; and those that want to buy into the scheme with their existing settlement.

This Bill has similar provisions but different treatments for these options, including a tighter scope for deciding whether a person can enter the scheme when their settlement has been exhausted.

For both consistency and fairness, these provisions need to be written in this Bill in the form they are expressed in the NIIQ legislation.

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